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Filed November 6, 1944

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

Civil Action No. 5499

JACK COLE COMPANY, INC., A CORPORATION,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Defendants

JURISDICTIONAL STATEMENT BY PLAINTIFF UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Plaintiff respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final decree of judgment in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47 a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies of Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on September 7, 1944. The petition for appeal was presented and allowed on November 6, 1944, together with an assignment of errors.

C. Nature of Cause and of Rulings Below

This is an appeal from a final decree of the District Court of the United States for the Southern Division of the Northern District of Alabama entered September 7, 1944. By said decree the Court ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed. By said suit the plaintiff had prayed the Court to restrain, enjoin and suspend the operation, execution and the effect and enforcement of an order of the Interstate Commerce Commission

(Division 5) entered Jan. 14, 1943 in the proceedings entitled number MC-73464 by the terms of which the Interstate Commerce Commission denied the application of this plaintiff for certificate of public convenience and necessity by limiting the authority granted so as not to include the transportation in interstate or foreign commerce by motor vehicle to the following described territory:

The State of Mississippi;
New Orleans and the State of Louisiana east of the Mississippi River;
Louisville, Kentucky;
Charlotte, Canton and Greensboro, N. C., and
Birmingham and a radial base of 90 miles.

Following the issuance of the said report of the Interstate Commerce Commission (Division 5), plaintiff filed its petition praying that the entire membership of the Interstate Commerce Commission grant reconsideration, oral argument or further hearing. The said petition was denied by the Interstate Commerce Commission on Jan. 14, 1943, although in the meantime the effective date of the aforesaid order of the Commission was postponed from time to time. The effective date of said order was stayed by the Interstate Commerce Commission until June 5, 1944, pending the outcome of plaintiff's petition in the District Court of the United States for the Southern Division for the Northern District of Alabama.

The principal grounds stated in the complaint in this Court are:

(a) That the Interstate Commerce Commission acted arbitrarily and capriciously in excess of its statutory power and contrary to the indisputable character of the evidence, in denying said motor carrier operating rights to the plaintiff by limiting them as above stated and (b) that the Inter-

state Commerce Commission, misapplied the law to the admitted or established facts as shown by the orders of the Commission themselves and the record in the case. Such error is predicated principally upon the following errors of the Interstate Commerce Commission:

1. The holding that where the plaintiff had been granted so-called grandfather rights in the territory involved by reason of plaintiff being in bona fide operation therein prior to the effective date of the motor carrier Act that the plaintiff had forfeited or lost these rights by reason of what the Commission styled a lack of sufficient continuity of service therein, the error consisting in the fact that as a matter of law no lack of continuity short of such inadequate service as to imply an abandonment of the operation would work such forfeiture and that the admitted and established facts in the record disclosed that there was continuity of operation sufficient as required by law and in conformity with the prior orders of the Commission:

2. That the Commission erroneously applied to the facts in this case principles of law applicable only to a proceeding to obtain a certificate of convenience and necessity where the plaintiff had not prior thereto obtained grandfather rights and thereby applied to a grandfather proceeding principles of law applicable only to proceedings other than grandfather proceedings.

3. That the record and orders of the Interstate Commerce Commission in the same proceeding and in this proceeding taken together show that the plaintiff devoted to said territory adequate continuity of service as measured and prescribed by the contemporaneous and prior orders of the Commission itself, which fact the Commission arbitrarily and capriciously ignored.

4. That the Commission found that certain stated Continuity of service was a lack of continuity of service and labeled an abandonment of service certain service expressly set forth in the orders and record which indisputably cannot be characterized as an abandonment of service.

The decision of the law court, if allowed to stand, would seem to establish the principle that findings by the Interstate Commerce Commission merely because couched in the language of the statute though contrary to, or without supporting findings of fact, based upon evidence of record, and though they manifest misapplication of the law to the facts. This is directly contrary to well recognized principles of judicial review. Accordingly it is important that this decision be reversed.

D. Cases Sustaining the Jurisdiction of the Supreme Court of the United States on Appeal

Board of Trade of Kansas City v. *United States*, 314 U. S. 534.

Union Stock Yard Co. v. *United States*, 308 U. S. 213.

United States v. *Pan American Petroleum Corp.*, 304 U. S. 156.

United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

Mississippi Valley Barge Co. v. *United States*, 292 U. S. 282.

Florida v. *United States*, 292 U. S. 1.

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420.

Assigned Car Cases, 274 U. S. 564.

Virginian Ry. v. *United States*, 272 U. S. 658.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268.

Texas & Pacific Ry. Co. v. *United States*, 162 U. S. 197.
McDonald v. *Thompson*, 305 U. S. 263.
United States v. *Maher*, 307 U. S. 148.

E. Decree and Opinion of the District Court

To this statement are copies of the opinion, findings of fact, conclusions of law, and final decree of the District Court.

Plaintiff, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

FRANCIS H. HARE,
Attorney for Plaintiff.
By FRANCIS H. HARE

APPENDIX "A"

Filed September 7, 1944

In the District Court of the United States for the Northern District of Alabama, Southern Division

Civil Action No. 5499

JACK COLE COMPANY, INC., an Alabama Corporation, Plaintiff,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Defendants

Findings of Fact and Conclusions of Law

The above action came on for hearing before the duly constituted statutory court, on June 2, 1944, being submitted upon the pleadings, and the record consisting of transcript of the stenographer's notes of the hearing held April 17 and 18, 1940, at Birmingham, Alabama, and Exhibit No. 10 filed at the said hearing; and Exhibit No. 16 filed at the hearing held June 24 and 25, 1940, at Birmingham, Alabama, as certified by the Interstate Commerce Commission on August 12, 1944; and upon the briefs and arguments of counsel for plaintiff and defendants, and the Court having considered the matters presented and herein involved, does hereby enter its findings of fact and conclusions of law as follows:

Findings of Fact

1. Plaintiff is a corporation existing under the laws of the State of Alabama, with its principal place of business at Birmingham, Alabama, and is, therefore, within the venue of this court.

2. Prior to June 1, 1935, plaintiff instituted an operation as a common carrier by motor vehicle, in interstate and foreign commerce, and within the time prescribed by law,

filed application with the Interstate Commerce Commission for a certificate under provisions of Section 206(a), or in the alternative for a permit under provisions of Section 209(a) of the Motor Carrier Act of 1935 (49 U. S. C., 306 and 309), authorizing its claimed operations, in transport of general commodities, within a wide territory consisting of twenty-four states and more particularly described in the Commission reports of January 31, 1942 Exhibit 2 to Commission Answer), and January 14, 1943 (Exhibit 4 to Commission Answer). The order of January 14, 1943 (Exhibit 4a to Commission Answer) was entered after several hearings, and is the final order herein, previous orders of August 9, 1939 Exhibit 1a to Commission Answer), and of January 31, 1942 (Exhibit 2a to Commission Answer) having been set aside and vacated by the Commission for the purpose of reconsideration, after grant of petition by plaintiff therefor. The final orders of January 31, 1942, and January 14, 1943, granted plaintiff's application to the extent stated in said reports and orders, authorizing plaintiff to continue its operations as a common carrier by motor vehicle, transporting general commodities within the territory, between the points, or to or from the points named and described in said reports and orders, and otherwise denied the application.

3. Findings and conclusions of the Interstate Commerce Commission are stated in the reports and orders of August 9, 1939 (Exhibits 1 and 1a to Commission Answer), January 31, 1942 (Exhibits 2 and 2a to Commission Answer), and January 14, 1943 Exhibits 4 and 4a to Commission Answer) and said reports and orders are hereby adopted by reference and made a part of these findings.

4. The order of the Interstate Commerce Commission entered January 14, 1943, is supported by substantial evidence.

5. Findings and conclusions of the Interstate Commerce Commission, as stated in said above-referred to reports and orders, are supported by substantial evidence of record.

6. Petition of plaintiff for reconsideration of the said final order of January 14, 1943, as filed with the Interstate

Commerce Commission, was denied by it and order of June 7, 1943 (Exhibit 5 to Commission Answer), and a later similar petition for reconsideration was dismissed by order of February 7, 1944 (Exhibit 6 to Commission Answer).

7. Except as to the part reopened for reconsideration under the order of April 30, 1942 (Exhibit 3 to Commission Answer), the order of January 30, 1942, became effective prior to September 2, 1943, on which date a certificate was issued to plaintiff covering authority granted by said order of January 30, 1942, as stated in the Commission Answer. The said final order of January 14, 1943, under several extensions of the effective date thereof, is now made effective as of October 7, 1944.

Conclusions of Law

1. This Court has jurisdiction of the action herein and of the parties thereto.

2. Where there is substantial evidence of record to support its findings and conclusions, an order of the Interstate Commerce Commission will not be annulled or enjoined under court review, under provisions of the Urgent Deficiencies. Act (28 U. S. C., Secs. 41 et seq.), unless said order exceeds the statutory authority of said Commission or violates some provision of the Constitution of the United States.

3. The order of January 14, 1943, herein reviewed, is supported by substantial evidence of record.

4. The order of January 14, 1943, is within the statutory authority of the Interstate Commerce Commission.

5. The order of January 14, 1943, does not violate any constitutional rights of plaintiff.

6. The complaint herein should be dismissed for want of equity at the cost of plaintiff.

Leon McCord, United States Circuit Judge. T. A. Murphree, United States District Judge. Clarence Mullins, United States District Judge.

APPENDIX "B"

Filed September 7, 1944

In the District Court of the United States for the Northern District of Alabama, Southern Division

Civil Action No. 5499

JACK COLE COMPANY, INC., an Alabama Corporation, Plaintiff,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Defendants

Order of the Court

The above action came on for hearing on June 2, 1944, before the duly constituted statutory court, plaintiff and defendants being represented by counsel, and having been submitted upon the pleadings, and the record consisting of transcript of the stenographer's notes of the hearing held April 17, and 18, 1940, at Birmingham, Alabama, and Exhibit No. 10 filed at the said hearing; and Exhibit No. 16 filed at the hearing held June 24 and 25, 1940, at Birmingham, Alabama, as certified by the Interstate Commerce Commission on August 12, 1944, and oral arguments and briefs of counsel, and having been taken under advisement by the court, and the court having considered all matters pertaining to the action herein, and having decided that the complaint herein should be dismissed at the cost of the plaintiff, and having entered its findings of fact and conclusions of law;

It is, therefore, ordered and adjudged, That the complaint herein be and the same is hereby dismissed at the cost of plaintiff.

September 7, 1944.

Leon McCord, United States Circuit Judge. T. A. Murphree, United States District Judge. Clarence Mullins, United States District Judge.

FILE COPY

FILED
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 850

JACK COLE COMPANY, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ALABAMA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

FRANCIS H. HARE,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 850

JACK COLE COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

In opposition to the motion of appellees to affirm this cause, appellant submits that the contents of the record itself is a sufficient answer and in addition thereto appellant directs the attention of the court to the following.

In the case of *Howard Hall Company* v. *United States*, 315 U. S. 495, this court reversed the commission.

Appellee contends that the reversal had no application to geographical scope of operations but only to commodities.

After such reversal of the *Howard Hall* case, the commission on November 22, 1944, in Number MC-42318 rewrote the operating rights of Howard Hall with the most drastic and radical changes in the geographical scope of operations, following a further hearing.

The condition under the title "Grandfather Application" stated:

> "The essential facts presented at the initial and further hearings in this proceeding will be considered, and

conclusions drawn therefrom will be in conformity with the principles announced by the Supreme Court in the *Howard Hall case* and *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, hereinafter called the *Carolina case*, referred to therein."

Under the title "Base Territory," Howard Hall on a record similar to ours sought, as we do, a base territory of 100 miles. Hall's former commission order gave him 12 miles and gives us 15. "In conformity with the principles announced by the Supreme Court in the Howard Hall case" the commission in Hall's new order gave him a new base territory "including all points in Alabama within 65 miles of and including Birmingham and Montgomery."

Under the title "Findings" the commission in the *Howard Hall* case has granted him a vast increase in geographical scope, which can only accurately be delineated by examining the order itself.

It seems to us idle to say that the decision of this Court in the *Howard Hall* case *as interpreted by the commission itself* is without application to geographical scope or operation. On almost parallel records the present Jack Cole operating order and the new Howard Hall operating order cannot co-exist.

We realize that this is not the stage of the proceeding to brief the case at length but it should suffice to show that this Court should not affirm the cause, but should take the record under submission, and at that point we can undertake to furnish this record with a brief which will demonstrate the merits of the appeal.

This appeal presents a substantial question and it is therefore respectfully submitted that the motion to affirm should be overruled.

FRANCIS H. HARE,
Attorney for Appellant.

In the District Court of the United States for the Northern District of Alabama

Civil No. 5499

JACK COLE CO., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered September 7, 1944, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. The Commission's report and order, dated January 14, 1943, granted appellant a certificate of public convenience and necessity under the "grandfather" clause of Section 206 (a) of Part II of the Interstate Commerce Act (49

[1] The court also made findings of fact and conclusions of law.

U. S. C. 306 (a)) to operate as a common carrier by motor vehicle of general Commodities over irregular routes as follows:

> Between Birmingham, Ala., and points within 15 miles of Birmingham, on the one hand, and, on the other, Detroit, Mich., Edwardsville, Kewanee and Litchfield, Ill., all points in Indiana, Ohio and Tennessee, those in that part of Illinois on, east, and south of a line beginning at Cairo, Ill., and extending along U. S. Highway 51 to La-Salle, Ill., thence along U. S. Highway 6 to Joliet, Ill., and thence along U. S. Highway 66 and Alternate 66 to Chicago, Ill., and thence in Georgia on and west of a line beginning at the Georgia-Florida State Line, and extending along U. S. Highway 41 to Atlanta, Ga., and thence along U. S. Highway 29 to the Georgia-South Carolina State Line.

This order, however, denied appellant's application in so far as it sought to operate from an enlarged base area embracing all points within 90 miles of Birmingham, on the one hand, and, on the other the points and territory outside of Alabama above mentioned, and, in addition thereto, Mobile, Louisville, New Orleans, and points within 20 miles thereof, Mississippi, North Carolina, the New York Commercial Zone and the Philadelphia Commercial Zone. An appeal was allowed on November 6, 1944. Service of the appeal papers upon appellee was not effected within

the five-day period prescribed by Rule 12, paragraph 2 of the Rules of the Supreme Court, for it was not until November 27, 1944, that the appeal papers were received by appellees.

The report and order of the Commission here attacked were issued on reconsideration, at appellant's request, of an earlier report of the Commission (32 M. C. C. 199), which had also denied appellant authority to operate in the same territory here involved. The basis for the Commission's action in refusing to grant the additional authority sought is indicated by the following statement from its opinion on reconsideration:

> In denying applicant the right to serve as a base territory points other than those in the Birmingham Area, it was pointed out that on or prior to June 1, 1935, approximately 88 percent of applicant's shipments were to or from points in the Birmingham Area; and that some few other Alabama points also were served, but that the service to or from any such point consisted generally of a single shipment. This figure of 88 percent is based on shipments from or to points in the radial area granted in the report on further hearing. If we take into consideration all shipments transported by applicant from or to all points in Alabama, the total percentage of shipments transported to or from the Birmingham Area would be approximately 92 percent.

Prior to June 1, 1935, applicant served Anniston, Gadsden, Gantts Quarry, Montgomery, Oxford, and Pell City, Ala., in the Highway Area, and Decatur, Hamilton, Huntsville, and Jasper, Ala., in the 90-mile Area. Of these points, Pell City, Decatur, and Huntsville were each served twice, Gadsden and Hamilton three times each but all in 1934, and the other points but once each. Since the statutory date, applicant has served more points in each of the two base areas requested but, with a few exceptions hereinafter discussed, the service to or from any such point consisted generally of from one to three shipments. Of the points served between June 2, 1935, and January 1940 (the date of the last shipments on the exhibits), in either of the two base areas, Anniston, Decatur, Gadsden, Montgomery, Oxford, Pell City, and Sylacauga, Ala., are the only points to or from which applicant has transported more than ten shipments since the statutory date. However, neither Oxford nor Pell City has been served since May 1937, and Sylacauga has not been served since 1938 except for one shipment in May 1939. As to the other four points, there is a lapse of almost a year at least in the service to or from any such point. Further, it is noted that applicant was found entitled in the initial report herein to serve as a base territory points in the Birmingham Area only, that it did not petition for any change in its base territory but filed

answers to the petitions seeking to have this proceeding reopened, and that it was at the further hearing that it sought an enlarged base area consisting of all points in Alabama and Georgia. We are of the opinion that applicant has not established that it is entitled to a larger base territory than that granted in the prior report. Compare *Howard Hall Co., Inc., Common Carrier Application,* 24 M. C. C. 273 (upheld by the Supreme Court in *Howard Hall Co.* v. *U. S.* 495.)

As seen, there is a lapse in operations to and from points in Mississippi of 7 months, to and from points in Louisiana of 18 months, and between points in Alabama of 10 months. No explanation of any of these hiatuses is offered except applicant claims that it had no intention to abandon operations to or from these points and that it held itself out to serve them. Section 206 (a) requires a finding of "bona fide operation * * * within the territory" not only "on June 1, 1935," but also "since that time." Applicant is not performing a highly specialized service but is a general commodity irregular route carrier. A mere holding out will not alone suffice to bridge the gaps of from 7 to 18 months in operations to and from these points, all of which are in reasonable proximity to applicant's base area, since applicant carries the burden of establishing its right to the statutory grant.

> Applicant's operations to and from the other points requested by it, namely, Louisville, points in the New York and Philadelphia Commercial Zones, and those in North Carolina, are reviewed briefly herein. Authority to serve these points was denied in the prior report. Summarizing, no shipments are shown between the Birmingham Area and Louisville after April 17, 1939, none during 1938 between the Birmingham Area and points in the New York Commercial Zone, none to or from North Carolina points after April 22, 1939, and none after July 10, 1939, to or from points in the Philadelphia Commercial Zone. Since the service performed in connection with operations to and from these points has not been continuous as required by the provisions of section 206 (a) of the act, we conclude that there has not been operation consistent with the claimed holding out, and that such holding out must be disregarded. Accordingly, we are of the opinion that the prior findings in respect of these points also must be affirmed.

As appears from appellant's jurisdictional statement, the principal grounds of attack upon the Commission's order are that it misapplied the law, particularly in recognizing that a lack of continuity short of an actual abandonment of the operations involved required denial of authority with respect to such operations, and that it acted arbitrarily and capriciously in excess of its statu-

tory power, and contrary to the indisputable character of the evidence. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

The legal standard to be employed by the Commission in determining the geographical scope of operations during the "grandfather" period is prescribed by the Supreme Court in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480–481. There it was said that the Act provides the test of "bona fide operation" which connotes "substantial as distinguished from incidental, sporadic, or infrequent service." See also *Howard Hall Co.* v. *United States*, 315 U. S. 495, 498–499. Clearly, under this test service may be fatally insubstantial and noncontinuous without there having been an actual abandonment of operations. It is plain from the above-quoted portion of the Commission's report that it applied this standard.

Since the Commission has thus applied the correct legal test, its findings as to the continuity and substantiality of the service in particular areas must be sustained unless patently in error or not supported by substantial evidence. *Alton R. Co.* v. *United States*, 315 U. S. 15, 23; *United States* v. *Carolina Carriers Corp., supra*, 482–483. So far as the limitation of the Birmingham base area here involved is concerned, it is significant that the Supreme Court has sustained another Commission decision restricting the size of this same

base area, where the operations conducted in the larger area sought were much more substantial than they are here. *Howard Hall Co.* v. *United States, supra,* 498–499. In a particularly painstaking report the Commission has analyzed in detail the evidence with respect to every point and area involved. The District Court's conclusion that the Commission's findings were supported by substantial evidence is clearly correct and should be sustained.

For the foregoing reasons it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(s) Charles Fahy,
CHARLES FAHY,
Solicitor General.

(s) Charles Fahy,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

DECEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

MAR 3 1945

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 850.

JACK COLE COMPANY, INC., *Appellant*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

Appeal from the District Court of the United States for the Northern District of Alabama.

APPLICATION FOR REHEARING.

JACK COLE COMPANY, INC.,
Appellant.

By: FRANCIS H. HARE,
Attorney for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 850.

JACK COLE COMPANY, INC., *Appellant*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

Appeal from the District Court of the United States for the Northern District of Alabama.

APPLICATION FOR REHEARING.

Comes the Appellant in the above-styled cause and as provided by Rule 33 of the Revised Rules of the Supreme Court of the United States, and within twenty-five (25) days after the Court has entered judgment dismissing said appeal, files this application for rehearing, and the undersigned counsel for Appellant hereby certifies that this petition is presented in good faith and that it is not presented only for delay.

FRANCIS H. HARE,
Attorney for Appellant.

PREFACE.

We make this petition as brief as will permit us to be distinct. The Court will realize that the peculiar nature of the proceeding does not lend itself readily to simplification. Very probably we over-simplified our reply to the Motion to Dismiss in a well meant effort to be formal and brief on unfamiliar ground.

While the memorandum decision of this Court does not disclose why the Motion to Dismiss was sustained, we assume from the contentions of the Appellees that it was sustained on one or more of the following holdings:

1. That this Court will not review the Interstate Commerce Commission in its province of fact-finding in the exercise of a highly specialized judgment on public convenience and necessity.

2. That this rule not to review applies particularly to operating rights applied geographically as distinguished from application to commodities.

3. That if this Court reviews the application by the Commission of principles of law under the Motor Carrier Act to the facts contained in our record, that the record does not show either that erroneous principles of law were applied or that sound principles of law were misapplied to the facts with results so unjust and insupportable as to require correction by this Court.

Appellant seeks a rehearing in this case by this Court because:

1. The correct legal principles necessary to the decision of the case are free from doubt.

2. Both this Court and the Commission have recognized the duty and power of this Court to review the application by the Commission of these legal principles to the geographical aspects of a carrier's operation.

3. The result obtained, tested by logic or tested by precedent, conclusively demonstrates that the order of the Commission here involved was unjust and discriminatory and insupportably repugnant to legal principles which admittedly apply.

Closely analogous precedent may suffice to state our position more briefly and plainly than any other method.

Three irregular-route common carriers of general commodities operated in Birmingham in competition and their record as contemplated by the Motor Carrier Act prior to June 1, 1935, and since, are so closely similar as to lack any substantial distinction. These three carriers were Appellant, Jack Cole Company, Inc., (2) Howard Hall Company, Inc., and (3) Alabama Highway Express, Inc. All three filed their applications under the grandfather clause and the Commission granted as their respective radial bases authority as follows:

1. Jack Cole Company—Birmingham and a radius of 15 miles.
2. Howard Hall Company—Birmingham and a radius of 12 miles.
3. Alabama Highway Express—Birmingham only.

This was the result of the application by the Commission of the principles of law as interpreted and applied by the Commission prior to the decision by this Court of the *Howard Hall case,* 315 U. S. 495.

The Howard Hall Company filed a proceeding similar to this before a Three Judge Court and appealed its decision to this Court, resulting in the decision and the annunciation of principles found in the *Howard Hall case, supra.* As the Commission understood and interpreted and applied those legal principles, they profoundly affected and controlled and changed, both as to commodities and as to geographical scope, the operating authority to which such carriers were entitled.

As a direct result, after the *Howard Hall case* was remanded to the Commission, it received a new order not only expanding its authorized commodities but increasing its radial base to Birmingham and a radius of 65 miles and other points, including Montgomery, Alabama. Also as a result, the Alabama Highway Express Company proceeding, which was then pending as this case is pending, was referred to the Commission for further consideration and a new order of the Commission was entered in that case expanding their operating authority to a radial base of Birmingham, Alabama, and a radius of 65 miles. In other words, the three parallel cases when decided prior to the decision of this Court all were granted a radial base of fifteen miles or less. If no error was committed in limiting Jack Cole Company to a 15-mile radial base, then no error was committed in imposing a similar limit upon the Howard Hall and the Alabama Highway Express operations. Following the mandate of this Court, the error has been admitted and corrected in the Howard Hall case and the Alabama Highway Express case.

The error in the Jack Cole Company case stands uncorrected.

It seems plain and distinct to us, and it seems to us unthinkable and a denial of an equal protection of the law, that this Appellant alone, on three parallel and analogous records, should be limited to the operating rights granted them under the principles of law as they were understood prior to this Court's great decision in *Howard Hall Company* v. *United States,* 315 U. S. 495, while in the instance of his two competitors the same mistake has been admitted and relief granted.

An error in the understanding or in the application of correct legal principles in all three cases is implied and demonstrated by the new orders given to Howard Hall and Alabama Highway Express as to their geographical scope. Does that not suffice to the end that this Court will conclude that at least a substantial question is presented for review

by this Court in order that we may have an opportunity to brief this case on its merits and submit it for this Court's decision?

In such a brief we would parallel the following:

1. The original orders granted to each of these three common carriers.

2. A brief digest of the three records so far as pertinent and material.

3. The present orders granted to the three similar carriers showing the relief granted the other two and the uncorrected mistake and injustice of the order in the Jack Cole case.

In the following case this Court has taken cognizance of geographical scope of operations:

Alton R. Co. v. *United States*, 315 U. S. 15.

As to that part of the order which denied this Appellant operating authority in Mississippi, Louisiana, and North Carolina for lack of continuity after June 1, 1935, although the Commission had previously found that Appellant was entitled to the authority in those States by reason of sufficient continuity prior to June 1, 1935, the Commission has affirmatively misapplied the law. Such lack of continuity after June 1, 1935, must amount to an abandonment of the operation. The record repels that assumption because (a) the fact that certain trips were made after June 1, 1935, even if not frequent, shows that the carrier had not abandoned the territory. (b) The correct legal principles as to whether or not service is reasonably continuous take into consideration the nature of the circumstances prevailing. Current contemporaneous orders of the Commission embodied in this record constituted instructions from the Commission to Jack Cole Company or an interpretation of the extent of continuity that would be

expected of Jack Cole Company, and the operation in those States was a full compliance with that interpretation. (c) There was never any proceeding or citation from the Commission to Jack Cole Company on the basis that his service was not reasonably continuous, but rather the Examiner for the Commission reiterated that he found that the Applicant's operation in stated parts of this territory denied by the Commission, was a bona fide continuous operation.

In conclusion, a brief on the merits, which we take it would be premature here, would show that this order denying this Applicant the operating authority as to which relief is sought was written at a time when the Commission conceived that the rights of irregular-route common carriers were to be determined with disfavor and that since this Court's controlling decision in the *Howard Hall case, supra*, the Commission correctly applies the law to irregular-route common carriers fairly and impartially. It is only necessary that this Court remand this proceeding to the Interstate Commerce Commission for further proceedings not inconsistent with its determination of the Howard Hall appeal and justice will then be done this Appellant and an unthinkable discrimination relieved and corrected.

Respectfully submitted,

JACK COLE COMPANY, INC.,
Apellant,

By FRANCIS H. HARE,
Attorney for Appellant.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each other party.

Dated at Washington, D. C., this 3rd day of March, 1945.

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FRANCIS H. HARE,
Attorney for Appellant.

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By WILMER A. HILL,
Of Counsel.

No. 850. JACK COLE CO., INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Alabama. February 12, 1945. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480–82; *Howard Hall Co.* v. *United States*, 315 U. S. 495, 498–99; (2) *United States* v. *Pan American Corp.*, 304 U. S. 156, 158. *Mr. Francis H. Hare* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees. Reported below: 59 F. Supp. 10.